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EMPLOYING FEDERAL LAW IN THE ASCERTAINMENT OF COMMON LAW RIGHTS.

We discussed editorially in 77 Cent. L. J., 305, the case of Wolf Bros. & Co., v. Hamilton-Brown Shoe Co., 206 Fed. 611, lately decided, by a majority, in the Eighth Circuit Court of Appeals. We endeavored in that discussion to view the question involved, as did Hook C. J., in his dissent, from the standpoint of principle as applied, as he said, to "a subject of modern origin," that is to say, the measure of damages for unfair competition in trade.

The learned judge, however, appeared somewhat handicapped in effort to attain this attitude, while to the two judges in the majority it seemed to exist mainly outside of the lucubrations, or their electrical successors, which they enjoy.

They, however, do not follow an intellectually lonesome trail, for usually opinions in federal courts

"Pile * * to o'ertop old Pelion"

federal, rather than state, authority in zealous attempts to scale rugged ascents to the discovery of general principle. Naturally a disinterested observer would say that decisions of courts, in whose ordinary jurisdiction common law principles are expected to reveal their exposition and expansion, ought to be looked to rather than to those where the common law is an exotic—a thing not of those courts but of their lives apart.

But the uniform of service is the suggestion of *esprit du corps* and much may be pardoned to that. Perhaps, also, there is rather conscious, than unwitting, tribute to the enviable plane state courts occupy, that federal courts struggle so persistently to be there as they are there. To our mind there is a dignity in the wide horizon of state jurisdiction with which the sphere of federal province cannot compare. It is a more lofty employment to search into the principles of right and justice and trace their development and application to the conditions of progressive civilization, than to refine upon the phraseology of constitution or statute, be they or not those of the greatest nation in the world.

But may it be pardoned, that the rule of decision by the Federal Supreme Court, in working out the meaning of a purely federal right, or the intent of federal statute in regulating such right, shall pass over into a field where federal right does not exist, because constitutionally forbidden to enter there?

All admit that the latter situation is impossible, but we may not be so certain about the other, when we run our memories back over the things in state law, which have been held to be within the independent judgment of federal courts. The transition from the attitude they show to making Congress accomplish by indirection what the constitution lays an embargo on, so far as direct action is concerned, seems not so radical. Decision creeps along in revolution, while statute would be a bold attempt to leap a barrier standing in its path.

Let us try to apply what we have said to the opinions above mentioned.

The question was whether profits made by a wrongdoer in unfair competition, no proof of loss appearing, were recoverable by one with whom the wrongdoer had unfairly competed in going after his trade. What in the way of authority does the main opinion seek in a question like this—one to which federal jurisdiction, so far as subject-matter is concerned, has no earthly relation?

It cites one Massachusetts case, one English case and eight federal cases, four of these last being from lower federal courts, whose authority would, at most, be only persuasive, and the other four be-

ing Supreme court cases, but referred to only as presenting "analogy from patent cases."

Judge Hook discussed every one of the cases except these last four and to our thinking, showed they had little to do with the question involved. But he appears to be in the same boat with the majority in seeming to think, that, if they were in point, more respect should be accorded to them than if they were state cases. He seemed also to think that the only reason that no rule, as by analogy from patent cases, could be drawn was because "unfair competition is a subject of modern origin," thus by implication admitting that were this not so it would or might. We place the three judges, therefore, in greatly the same attitude as to the preferred source of controlling or persuasive authority, notwithstanding that the question here pertained only indirectly to federal, and directly to state, jurisdiction. But this is an old story. What we are trying to do is to show, that the federal mind goes beyond mere independence in construction of state law, and has advanced to acceptance of the doctrine that in decision of questions purely federal in character, guideposts may be set or analogies drawn to shape decision regarding common law rights. And this, notwithstanding everybody admits that congressional legislation attempting to regulate common law rights would be unconstitutional.

What is it to the common law that a federal patent statute says that for infringement profits or damages, but not both, are recoverable in equity and only actual damages at law? If nothing, why should a federal court trying a cause, by reason of diversity of citizenship, say that by analogy a common-law right may be ascertained?

Is a federal court to push a federal rule or a federal statute to a point where Congress is unable to place it? And, if it may, what clause of the constitution entitles it to do this?

NOTES OF IMPORTANT DECISIONS.

NEGOTIABLE INSTRUMENTS LAW—ALTERATION BY FICTITIOUS CREDIT BEFORE DELIVERY.—The Supreme Court of Washington shows a most commendable desire to construe the Negotiable Instruments Law in the spirit that aimed at its uniform operation throughout the country, a spirit so much desired as shown in discussion in 77 Cent. L. J., 282-294.

But it seems to us that the construction placed thereon is not sound, and instead of avoiding the niceties that made decision so variant, it leads somewhat along the same line, Washington Finance Corporation v. Glass, 134 Pac. 480.

This case shows that some of the defendants were accommodation makers on a note, with payee's name in blank, for the sum of $15,000. When it was presented to a bank for discount it would only lend $11,000 thereon, and to make the note run for this amount, a credit of $4,000 was entered on the back thereof. This was held such as alteration before delivery as released the accommodation makers, it being said, that, whatever might be the case formerly, there was now no ambiguity and the alteration was plainly material.

Two sections of the act are quoted. One requires that a material alteration avoids, except that if it comes into the hands of a nolder in due course not a party to the alteration, "he may enforce payment thereof "according to its original tenor." Here it looks like the alteration means one prejudicial to a non-assenting party, because surely the holder in due course where the alteration is in the way of a reduction ought not to be allowed to enforce payment according to the original tenor.

The second section specifies alteration in date, the sum payable, the time or place, the number or the relations of parties, or the medium of payment, saying all such alterations are material. But when we note the section next preceding, this would seem to mean that the alteration must have a possibility of harm to the non-assenting party, or it would not have been stated for his benefit, that holder in due course is limited to recovery "according to its original tenor."

In this case there was no holder in due course, so far as effect of alteration was concerned, but the proviso about holder in due course seems to offer a key to construction.

BANKRUPTCY — ASSIGNMENT OF ACCOUNT FOR GOODS SHIPPED AS COLLATERAL.—It has been held, that a court of bankruptcy administers an estate somewhat after the manner of a court of equity, one of its cardinal rules being that present fair consideration in due course of trade takes a transaction out of the range of preference denounced by the bankruptcy act. This principle seems to have been overlooked in a case recently decided by the district court of the Eastern District of Pennsylvania sitting in bankruptcy. In re, Shulman, 206 Fed. 129.

The facts in this case show, that a bankrupt having sold goods on time delivered to a carrier. He then went to a bank and assigned, as collateral for a loan, the accounts that were to fall due and the "goods covered by or described therein."

It was further provided: "That in the event of the rejection or return of all or any part of the merchandise so sold, shipped and delivered," assignors were "to receive them in trust for the said (bank) under advice to them and surrender it or the proceeds thereof if sold, upon demand."

The court first ruled that the assignment of the goods was ineffective because they had been sold to purchasers and consigned, and had passed out of the assignor's possession or control. It was said that: "At best it (the assignment) amounted merely to a promise by the firm that, if necessary, they would pledge the goods to the bank at some indefinite time and under some undefined circumstances." Then the court takes up the other clause above partly quoted. It was held not to help the bank, it being said that title having been lost by the sale and delivery to carrier were "revested" on refusal of consignee to accept.

Is this true? Does it not seem that title did not, so far as consignor and consignee, actually pass on delivery to carrier? The rule that it did supposes the existence of a contract of sale, but in this case there is relation back to make what seemed a contract of sale not such. Title then only apparently and not really passed with delivery to carrier. This being true the assignment carried the goods. They being carried, the other clause provides for their disposition. Certainly it would seem true that, if this sale had been for cash and shipment made with draft and bill of lading attached, and it had been provided the goods were to be returned to shippers and by them held in trust, that part of the assignment would be operative.

This proceeds, as the court proceeded, along the line of technical reasoning, but, even if our view is faulty, nevertheless the principal thing for the court of bankruptcy to inquire about is whether giving the assignment effect would constitute an unlawful preference. That it would not, seems clear, and, therefore, as a trustee stands, except as excepted, in the shoes of the bankrupt, it would seem that the assignee who had paid a present fair consideration should have been protected. This transaction seemed to have been in due course of trade and bankruptcy statute is not intended to interfere with that.

CORPORATION — DIRECTOR LIABILITY FOR DIVERSION BY CORPORATION ACTING IN FIDUCIARY CAPACITY.—The case of Bluefields S. S. Co. v. Lala Ferreras Cangelosi S. S. Co. et al. 63 So. 96, in Louisiana Supreme Court, decides that where a corporation collected cash and the proceeds by discount of drafts on sale of merchandise, belonging to another and then with the knowledge of its president used such cash and proceeds in payment of its own obligations, this was a diversion of trust funds making the corporation and its president jointly and severally liable therefor.

It was urged that all the directors of the corporation should be held for the knowledge which they should have had concerning the acts of the corporation of which they were directors, and which they could have learned had they examined the books and papers of the company.

The court said, however: "But the original contract was not entered upon the minutes of the board; and the discount or sale of the drafts was not shown to have been communicated to the other defendants by Lala (the president) or in any other way. Under these circumstances, we are of opinion that the members of the board of directors, other than the president, cannot be held responsible for the diversion of the funds referred to."

There was a large amount involved in this matter, and it would seem that, had these directors really been managing or taking part in managing, they would have had knowledge as to the source of money to its credit in so large an amount. In other words, these directors were held absolved because, while in a sense trustees, there is by no means such strict accountability visited upon them as in

the case of trustees eo nomine. Whether there should be as much forgiven to quasi-trustees as was forgiven in this case seems very debatable.

HOME RULE SYSTEM OF MUNICIPAL GOVERNMENT—CITY SOVEREIGNTY VERSUS STATE SOVEREIGNTY.

Wherein Municipal Government Has Heretofore Been Unsatisfactory—The respects in which municipal government in this country has been stated to be unsatisfactory are: (a) Too much politics and incidental corruption; (b) Interference from outside for political purposes, with purely municipal concerns; (c) Lack of efficiency and business ability in discharging the city's work; (d) Extravagance.

These conditions have caused hesitation in the undertaking of much work that growing cities now have thrust upon them and cannot evade, if they measure up to a high percentage of usefulness to the people they are instituted to serve.

Remedies Proposed—To-day, current thought is, that a municipal government approaching the form of pure democracy, is ideal; that it will be a panacea for many of the social ills. The same thought existed in this country in the period from 1830 to 1850. All evils in government were to be done away with by bringing the people as nearly as might be to the seats of governmental power. The movement did not prove a success, however, but resulted in the formation of "rings" and loose, disconnected organization. The people became disappointed and a spirit of distrust was abroad of the success of the reforms in municipal rule, with the result that there was a readjustment of political theory. Then the practice of the monarchical principle was re-introduced, by which the powers of the mayor were much increased and he was placed at the head of the municipal government. Unconsciously, we use portions of the monarchical system in order to save ourselves from the weaknesses and the impracticable side of a pure democratic form. This is the general situation in which most cities are found to-day. The mayor is made the head man of the town and is more or less of a local monarch.

The Home Rule Remedy—As you all know, the Michigan constitution of 1909 contains a provision guaranteeing home rule to the cities[1] and an act passed in that year[2] known as the Home Rule Act, providing a method for the execution of that constitutional provision. This was considered by the Michigan Supreme Court to only permit a complete revision of an existing charter or the incorporation of a city under its provision by the adoption of a new charter.[3] No amendments to an existing legislative charter was authorized by it and the act of the legislature passed in 1911,[4] which permitted piece meal amendments of a legislative charter was declared invalid.[5] This led to the amendment of that section of the constitution giving home rule rights to the cities existing under legislative charters[6] and an act at the last session was passed putting this constitutional amendment in practical condition for use, so that on the whole, all existing legislative charters could be amended or completely revised by the people of each municipality and permitting the introduction into the local city governments of the commission form and the power to enlarge their field in the municipal operation of public utilities if the people so desired. We therefore, have within the last four years, Michigan cities vested with more political power than they heretofore possesssed since the foundation of our state or territorial government. The electors are themselves, subject to the constitution and general law, made the leg-

(1) Art. VIII. Secs. 20-25.
(2) Act No. 279 P. A. 1909.
(3) Atty. Gen. v. Harrington, 160 Mich. 550.
(4) Act No. 203 P. A. 1911.
(5) Atty. Gen. v. Com. Council of Detroit, 168 Mich. 252; Gallup v. City of Saginaw, 170 Mich. 195.
(6) P. A. 1912, p. 66.

islative assembly to enact the local organic laws for their city, with no outside interference possible, since the legislature is by the constitution shorn of the power to pass or approve special municipal charters.[7] The idea which these constitutional changes and legislative acts portend is in a qualified sense, a sovereign city. The cause of this action lay in a deep seated dissatisfaction among the more important cities of this state with the action of the past legislatures in reference to the character of the charters that had been framed for them, as well as the entanglement of purely local concerns in the meshes of state political intrigue. The Supreme Court of Missouri crystalizes the thought in that state, on the same subject in the following language, which applies here,[8] to-wit:

"City charters were the favorite ground for special legislation. The constant tinkering to which those instruments were subjected, not only created confusion and uncertainty in construing the law, but covered the state with specimens of incongruous pieces of patchwork legislation which gave widely varied rights to, and imposed dissimilar duties and obligations on the citizens of different localities, without any substantial grounds for these variances. . . . All cities under the new constitution were to be subject to genuine, general legislation, but these phases of purely municipal government which are properly regulated by charters, were to be protected against the ancient mode of change."

The idea of the power to establish a Freeholders' charter is therefore to make our cities free and to be under no necessity of asking and jockeying at the Capitol for special local legislation. Up to date, three cities in Michigan have incorporated, seven cities have revised, and five cities have amended their charters under the Home Rule Act.

It Is Republican in Form of Government —It has been argued in some courts that a home rule bill and a charter enacted under it is in violation of Section 4, Article 4 of the Federal Constitution, which provides that: "The United States shall guarantee to every state in this union, a republican form of government."

The idea prevailing at the time this clause was inserted in the Federal Constitution was that in a union of the states founded on republican principles and composed of republican members, the Federal Government should possess authority to defend the union against aristocratic or monarchical innovations, because of the intimate association of the states thus uniting and the great interest which each has in the political institutions of the other, and the right to insist that the form of government existing in each at the time of the union should forever be maintained. It presupposes a republican form to exist and that is what it applies to and guarantees.[9]

The Home Rules Acts of Minnesota and Colorado were attacked upon the ground that they violated this principle, in this; that they departed from a republican form of government; but in answering the objection the Supreme Court of Minnesota[10] said:

"At the close of the Civil War this guaranty was made the subject of much discussion in Congress, partaking of a political character, in the efforts towards reconstruction. It is a Federal guaranty, to be exercised by Federal, rather than state, authority. The conditions and necessities of its exercise are as yet quite abstract and theoretical, and it is not easy to see how its application here is of any particular consequence. It will be admitted, however, that this state cannot supplant its republican form of government by "aristocratic and monarchical innovations," upon principles inherent in the nature of the government, but it may change its constitution in any way consistent with its own fundamental law; and we are unable to see the force of the suggestion that the amendment of 1898 is not republican in form as well as spirit. It is true that, by the submission of charters and amendments to municipalities in the manner provided for

(7) Atty. Gen. v. Thompson, 168 Mich. 511.
(8) Kansas City v. Scarritt, 127 Mo. 652.
(9) The Federalist, Hamilton Edition, p. 241-5.
(10) Hopkins v. Duluth, 81 Minn. 191.

by the amendment, a change is effected; but it is a change that by every historical sanction, from the earliest times, is republican in form and essence. The Federal as well as the state government, is representative in character, although the people do not directly vote upon the adoption of the laws by which they are governed. Yet it cannot be said that, if they were able to do so, a provision to effectuate that purpose would not be republican. We apprehend that a little reflection must satisfy any one that the advantage of providing local self-government by the voters directly interested through a "referendum," is abstractly as well as concretely more republican than through representatives of the people in the legislature, many of whom are not at all interested in the affairs of the given locality."

The Colorado Supreme Court likewise upheld this Home Rule Act.[11] At p. 387 the Colorado court said: "The amendment is to be considered as a whole, in view of its expressed purpose of securing to the people of Denver absolute freedom from legislative interference in matters of local concern; and so considered and interpreted, we find nothing in it subversive of the state government, or repugnant to the constitution of the United States."

Basic Principle of State Control Over Cities—The basic principle underlying the relations between the sovereign people of a state and a limited area of that state where is found a large aggregation of individuals, is stated in an opinion of the United States Supreme Court in this language:[12]

" . . . the main distinction between public and private corporations is, that over the former the legislature, as guardian of the public interests has the exclusive and unrestrained control; and acting as such, as it may create, so it may modify or destroy, as public exigency requires or recommends, or the public interest will be best subserved. It possesses the right to alter, abolish or destroy all such institutions, as mere municipal regulations must from the nature of things, be subject to the absolute control of the government. Such institutions are auxiliaries of the government in the important business of municipal rule. A municipal corporation . . . is a representative not only of the state, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere, the powers of the state. The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the state at large. It may enlarge or contract its powers or destroy its existence."

In this manner has the ultimate sovereign power of every state over its municipal corporations been defined. This doctrine has been questioned by some eminent writers, but a careful analysis of it will convince the careful thinker of its correctness. Diametrically opposed as it is, however, when exercised, to the thought of home rule for cities, the ultimate power of the sovereign state so defined, may be said to represent a valid power asserted to its logical extreme. It would be inexpedient in ordinary times from the standpoint of well considered public policy, for any state to adopt as a method of municipal city government, this principle, reaching to the last analysis of things in the centralization of power. The people would rebel against it if put into practice and in some instances, where attempted, have done so with force and arms even where the subject matter was a state affair theretofore administered by local officers.

In New York State, prior to 1857, the police department had become very corrupt. As a remedy, the state adopted a metropolitan police bill creating a police district which embraced all of New York City and certain outlying districts and a police commission was appointed over it, by the Governor and Senate. Its enforcement was forcibly resisted by the people of New York, led by the mayor, to the extent of some bloodshed, but it was finally referred to the courts and they held the law valid.[13]

A similar question arose in Michigan over an attempted extension of the powers of the metropolitan police of Detroit to

(11) People v. Sours, 31 Colo. 385-387.
(12) United States v. B. & O. R. R. Co., 17 Wall. 328-9.
(13) People v. Draper, 15 N. Y. 352.

police certain outlying townships in Wayne County in the enforcement of the liquor laws. The Supreme Court, under the existing state constitutional provisions held it invalid, but Sherwood, J., dissented and followed the principle announced in the New York case, upon the broad ground that enforcement of criminal laws was a state concern.[14]

Democracy of the City—The demand for increased power in local self government of cities finds there its intensified expression. There is found pure democracy in thought, hope and desire, if it exists anywhere. The New England town meeting idea is raised to the third power in the thought of the people of a city acting through a commission of their own selection, drafting their own charter and the electors adopting it by a referendum; hence the thought of *city sovereignty* as a separate and distinct attribute from the state sovereignty idea, presents itself and has, I believe, solid ground to rest upon and a strong bearing in the construction and interpretation of a Freeholders' charter, so established.

Sovereignty—The conception of sovereignty as an attribute of an organized political government, has generally been regarded as belonging to a nation having an independent standing among the family of nations.

The New York Court of Appeals[16] has held with reference to the city of New York that::

"The corporation . . . . Possesses two kinds of powers, one governmental and public, and to the extent they are held and exercised is clothed with sovereignty—the other, private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes. The latter for private purposes, while in the exercise of the former, the corporation is a municipal government and while in the exercise of the latter, is a corporate, legal individual."

(14) Board of Metropolitan Police v. Board of Auditors, 68 Mich. 576.

(16) Lloyd v. the Mayor of N. Y., 5 N. Y. 369.

The theory of modern political science is that sovereignty in this country resides in the people and that government is merely the agency by which it is exercised. In some countries, as in Russia and formerly in China till the establishment of their republic, sovereignty was identified with the autocratic power of the Emperor. In many states such as England, and Germany, sovereignty is nominally predicated of the Monarch, but in reality he does not possess it. We, in this country, speak of popular sovereignty, as the ultimate authority in government vested in the people, but whatever the human contrivance may be, devised for the government of man, the true source of sovereignty must be found in the principle of right and justice combined with the consent of those whose obedience is required and when you trace to its origin, the real sovereign must be found in the man.

City Sovereignty—Dillon, in his work on Municipal Corporations,[17] says that:

"It is quite impossible in any brief space to convey an adequate idea of the exact nature and properties of an American municipal corporation." There is nothing, says he, "in the law more complex and abstruse."

All the individual members of a municipal city corporation, present and future, are but one person in law, a person that never dies. Like the flow of a river, the people of a city are the same city as the waters of the river are the same river, though the people are changing every day as the waters of the river change every instant with its constant flow. Its members do not hold certificates of stock as in the private corporation, nor vote cumulatively according to the ratio of property owned. Each member has no title to any of the corporate property yet an indirect beneficial right to the enjoyment of the whole and equal with his neighbor.

It may be said in general terms, to be the vesting in the people of a given place with the local government thereof.

(17) 5th Ed., Vol. 1, Sec. 33.

If, therefore, the devolution of this sovereign power from the people of the state up through the constitution, and from thence back to the people of the cities by virtue of a legislative act prescribing the method of its exercise, gives the right to frame their own municipal charter without interference or supervision by the state's legislative branch, why is it not true that when the people of a city possess that power to make their own charter of incorporation and all power in the legislature to force one upon them without their consent or to enact one for them by a local act has been taken away, that the people in such city in enacting their own charter, are not exercising their original power as sovereigns if the true source of sovereignty is in man in the first instance?

The California Supreme Court seemed to regard the creation of a Municipal Corporation under their constitution as a state affair and a parting by the state of a portion of its sovereignty. Upon the point they said:[18]

"Viewing this question from another angle, it seems that the creation of a charter is not essentially and alone a municipal affair. It is a state affair, and that fact is recognized in unmistakable terms by the state when the constitution demands that the state legislature approve the instrument by a majority vote; and until such approval it has no life. Notwithstanding all the people of the municipality with a single voice may ask for a new charter, yet the state, by and through its legislature, may deny that request. The legislature stands as the representative of the sovereign power of the state, and has the arbitrary right to grant or refuse charters to municipalities. A grant of a charter to a municipality is a grant of so much power. It is a delegation of a certain amount of power to the municipality theretofore vested in the state. It is a parting with a portion of its sovereignty. It is for this reason that the state, through its legislature, must breathe into the charter the breath of life; and if the state withhold its breath, such action is beyond all review. When the constitution vested this omnipotent power in the legislature, it would seem that the framers of that instrument deemed the creation of a municipal corporation a state affair of the greatest import."

A city corporation charter created or revised under such a home rule law as Michigan's is not the act of the state legislature. It is not the act, even of the people of the state. They authorize it, but they do not enact it.

Where do the charters so created have their source. It is not from outside, for only electors of the city can create it. Does it not come from the people of the city, the original sovereigns for that locality? In speaking of the Freeholders' charter of the city of St. Louis, which the people in that city have enacted under a home rule act, the United States Supreme Court, Justice Brewer writing the opinion, which case has been previously referred to in sustaining the validity of its provisions, used language of potent significance on this point. St. Louis v. Western Union Telegraph Co.[19]

Your attention is directed to the contrast yet without conflict between the following language and what was said where that court was defining the relations between the state and its cities and pointed out the distinction between public and private corporations, that has been previously quoted.

Concerning the St. Louis charter, the court said:

"In pursuance of these provisions of the constitution, a charter was prepared and adopted and is, therefore, the organic law of the City of St. Louis and the powers granted by it so far as they are in harmony with the constitution and law of the state and have not been set aside by any act of the general assembly, are the powers vested in the city and this charter is an organic act so defined in the constitution and is to be construed as organic acts are construed. The city is in a very just sense an 'imperium in imperio.' Its powers are self appointed and the reserved control existing in the general assembly does not take away this peculiar feature of its charter."

(18) Fragley v. Phelan, 126 Cal. 389.

(19) 149 U. S. 465.

In California their general assembly had to approve such a charter before it took effect.[20] The power of cities in Michigan are more unqualified than in California in framing a home rule charter. The check here is the constitution, and the general Act, with the statutory right of the governor to veto a freeholder's charter or an amendment thereto before its submission to the voters, but the City Council has the right to submit it and the people to adopt it over the veto of the governor. This veto power of the governor conferred by the Michigan home rule act, is not in the constitution. It is a statutory veto power which the legislature introduced into the home rule bill.

Reason for a Liberal Rule of Construction of a Home Rule Charter—The true significance and use of the sovereignty idea as applied to cities consists only as a conveyor of the thought that the political rights of a city so organized, are to be considered most favorably when its people as the original sovereigns, adopt a freeholder's charter rather than that the strict rule of construction should be followed, as has been the case in all royal charters or charters granted by the legislature. All royal or legislative grants of municipal charters are construed most favorably to the king or the state and against the grantee. The same rule follows in a royal or legislative grant of land or a franchise of any description.[21] But the rule, when the citizen is sovereign, and he grants a charter for his own self-governing community, should be liberal and in favor of the people that made it, under this new method of local legislation.

The Supreme Court of California adopted a strict construction of the power of a city to frame its own charter under their constitution, and held it was a power that being once exercised, it was exhausted, and that the City of Los Angeles, having once framed and adopted a charter under it, it could not frame a second freeholder's charter.

The same question arose in Missouri over the charter of Kansas City, and in Washington over the charter of Seattle. The courts of these two states refused to follow the California construction, and held that the power was continuing.

The following language of the Washington opinion is quoted and approved by Missouri,[22] to-wit:

"We think that the power to frame a charter for themselves is a *continuing* right vested in the voters of the city, and that it does not become exhausted because once exercised . . . the object of the constitutional provisions is to confer upon the large cities of the state, the power of local self government, (subject, as already stated, to general laws), and that this right to 'home rule is not limited at all in point of time.'"

And after approving the Washington liberal construction and criticising the California strict construction, the Missouri opinion said further:[23]

"With us the motive of the people in conferring this privilege upon such cities has been held to be to prevent the officious intermeddling with the charters of our cities without the knowledge of those whose rights are affected; and was aimed at the recognized frequent interference by the legislature with city charters, and consequently our people thought best to confer that right upon the people who were to be affected, which, it has been declared, was entirely in accord with the genius of our institutions, being the regulation and government of local affairs within the observation and control of those who are to be affected thereby."

Is there not, therefore, from all these considerations, such an attribute of a city so organized under a home rule act, that it may be properly designated "city sovereignty?"

Effect Upon Future Administration of City Affairs, Increased Municipal Activity—There is an economic as well as legal side

(20) Lubliner v. Albers, 145 Cal. 291; Fragley v. Phelan, 126 Cal. 389.

(21) Blackstone 347; Leavenworth, etc., R. R. Co. v. U. S. 733.

(22) Morrow v. Kansas City, 186 Mo. 686.

(23) 687-8.

to the idea of "City Sovereignty" worth while for lawyers to consider.

Our city corporations have taken on, and practically made a contract with their people to solve, many problems of a public utility nature, such as by their assuming to do the work of constructing and maintaining public parks and recreation grounds, thoroughly well paved streets, lighted, and kept clean. They have agreed to furnish an adequate water supply, a fully adequate sewer system, a sanitary method of garbage disposal, to furnish fire protection and so forth. In time they will probably seek to take on other important classes of commercial work. Why should not the masses of the people be urged to insist upon the adoption of scientific economy and aim at 100 per cent efficiency methods on all public work undertaken the same as are now in use every day by the best managed private business concerns, and force out of that line of public commercial business the trade of politics? It will not be a success in any other way, in the highest sense of the term.

The city governments ordinarily undertake through their metropolitan police departments the enforcement of most of the criminal laws of the state within their jurisdictions. They undertake suppression of social vice, protection of private property and the personal rights of each individual, and business concerns in riotous times as auxiliaries of the state and county authorities. With what success, is not discussed here.

The other municipal work in our cities is greater than in old established cities, because first, of the comparative newness of our country; second, the pressing necessity to do much that we are scarcely able or willing to take on; third, the eagerness of our people to make use of the new devices for increased comfort and to save time.

The new constitution of Michigan and the Home Rule Act now in force there authorizes cities to acquire, own and operate public utilities within or without their city limits for supplying water, light, heat, power and transportation for its inhabitants, (the latter restricted to cities with 25,000 or more population), and all works which involve the public health and safety. Will not business men as well as the general masses of the people eventually find legitimate benefit in the use of municipal machinery for commercial advancement of the city in the development of public utilities by the government thereof with captains of commercial industry retained at their head who will take pride in operating them with as great or even greater efficiency than as private concerns? Such concerns demand in their heads thoroughness and method, organizing ability, and the infinite capacity for taking pains. Will the general masses of the people vote and pay the necessary money, the sinews of both public and private business, as well as war, in order to buy the necessary properties without excessive bonded debts and also secure the services of such business administrators as are competent to solve the various perplexing utility problems presented, in the interests of a consolidation of the rights of the community, and make them successful, high grade going concerns instead of leaving the public rights split up into a thousand parts and appropriated by others as private vested rights? In other words, may we not conceive of the formation of a combination in those lines of public business for the benefit of all the people, with its dividends turned into the public treasury as a source of revenue supplemental to taxation? Such a consolidation with full compensation for all actual private property taken, would be legitimate co-operation by the people in the use and enjoyment of their clear public rights that are now turned to the profit of private enterprise.

Not many years ago it was social heresy for a city to think of owning its gas, electric light or water supply plant. To-day it is common. Some consider it heresy today for a city to own and operate its street

transportation system. That also is common in some jurisdictions. We adopted our city plan of organization in this country chiefly from England and are using in some places European methods in the improvement of our plans for better cities. Let us hear of the experience of some of our foreign neighbors.[24]

"Everywhere in Europe (says Frederic C. Howe, author of "The City, the Hope of Democracy"), the city is governed by merchants, manufacturers, bankers and professional men. Everywhere the city does many things which we would call Socialism. Germany, Austria, England and to a growing extent, Italy, Belgium, and France, see in the city a means for promoting business and commerce, an agency for convenience and happiness. To an increasing extent the city is making war on poverty and disease. This idea of the city as a joint stock undertaking for doing things by us left in private hands or not done at all is what most distinguishes the cities of Europe from our own. The European city has a community sense. It enjoys something of the sovereignty of the nation."

"With us property is free to do much as it wills. Private business if sovereign. We have little city sense. The rights of the community have been split into a thousand parts. Councils, legislatures, and courts reflect the will of private property. Billboard owners, builders, tenements, skyscrapers, street railways, and land speculators secure freedom from control on the plea that regulation is an interference with liberty or is the taking of property without process of law. We have not yet begun to think in terms of city sovereignty."

Again in the same article, he says:

"The business men who govern the British and German cities have taken the street railways, gas, water and electric lighting industries away from other business men in the interest of the city. Of fifty largest cities in Great Britain, thirty-nine own the water supply, twenty-one the gas, forty-four the electricity and forty-two the street railways. The percentage of ownership in Germany is somewhat higher. In the latter country, out of the fifty largest cities, forty-eight own the water supply, fifty the gas supply, forty-two the electricity supply, and twenty-three the tramways. And these cities have done with the franchise corporations what the private business men who own them in America say cannot possibly be done. There is no over-crowding on street cars, no "Step lively," "Step forward," on these municipal lines. The city thinks that the tired working man and working girl should be treated at least as humanly as the cattle waiting to be slaughtered in the public abattoirs. Passengers are not packed in to make swollen dividends from strap hangers. The number of passengers permitted to stand is limited. One rarely has to adopt the alternative of standing, however. The average street railway fare in England is two and one-tenth cents per passenger. In Germany it is a trifle more."

"Cities like Glasgow, Manchester, Liverpool, Dusseldorf, Frankfort, use these agencies as part of city planning, as the city's circulatory organs. The tracks are extended out into the country to cheapen rents and secure healthy living environments. Cars are comfortable and clean. Electric power is sold at a low cost to encourage industry, to check the smoke nuisance, and build up the community, while cheap gas is brought to the poorest by penny-in-the slot devices."

"Transportation, light, power, water, are necessities to the comfort and convenience of the community, to its industry and its people. For this reason they should not be left in private hands, English and German officials argue."

"The thing that most distinguishes the European city from our own is the control of property in the interest of the people. The city is a physical, not merely political thing. It is an agency for good as well as for evil. Officials and business men view their cities as they view their private business, with the same desire to see them prosper, grow in wealth, and enjoy an income from other sources than taxation. Everywhere the city controls private property and private business through ownership as well as regulation. It insures service and cheapness by a municipal monopoly or by municipal competition."

In this country some of our best cities are putting into practice decidedly advanced theories on these and other subjects. For example, by adopting laws called "Housing Laws" in the interest of health, sanita-

(24) The Outlook, Jan. 25, 1913.

tion, the improvement of the living conditions of the laboring people and making a start towards wiping out eventually, their slum districts altogether. If ever the question was concisely answered, "Am I my brother's keeper?" such laws answer it, "Yes."

The prevention and cure of bad housing conditions means a proceeding along three lines:

1. "Every new dwelling and tenement must be constructed so as to afford suitable living accommodations.

2. "Every old house not now fit for habitation must either be demolished or improved so as to become fit, or occupancy not allowed.

3. "All habitations, new and old, must be maintained in good repair and sanitary condition."

In an address before the National Conference on Housing, which met at Philadelphia this last year, Sir James Bryce, Ambassador from England, stated concerning city life:

"No city has maintained itself and its standard of physical excellence without an indraft from the country. If you were to leave the city alone, stop the indraft of the people who have grown up and formed their constitutions in the air of the country, the population would decline physically, and perhaps, begin to die out."

We have plenty of municipal work ahead of us as private citizens, and how much each lawyer participates in it, how much of the dynamic force called Civic Patriotism, he generates, is, of course, for him to decide, but he certainly should be interested with all other people for a better, cleaner, happier, more industrious city life, where half the population of our state build their homes, develop their enterprises and so many of them live their lives largely in the stores and factories and furnish a market for the output of the farms. The pursuit of their fullest happiness is the ideal of "City Sovereignty." A city of prosperous people who love their state and this nation above all others. WILLIAM K. CLUTE.

Grand Rapids, Michigan.

THE NECESSITY FOR THE SCIENCE OF LAWS.

Our Judiciary and our Bar are the scientists who by reason of their training discover and apply the principles of law. Theoretically they have by virtue of their knowledge and experience woven a beautiful fabric, the variousness of the texture of which is limited only by the conditioning it meets, and practically too, the application of the law has on the whole been true to principle and parallel with general progress. The intent to properly administer law always has been and is now paramount. Individual mistakes resulting in injustice or unnecessary hardships are relatively rare. A summing up of the many and various judicial decisions and the opinions of eminent practitioners, covering a period of several centuries, shows a wonderful structure of laws and customs.

In a quest for the philosophy of laws, we are guided by the rules of Science. Laws express themselves in accordance with the characteristics of the community. The state of civilization of a People or Nation, determines the character of its laws and the reason for their enforcement. Statutes and constitutional provisions take their forms from the moral and social development of the Age. One aspect of the philosophy of laws then, is the constant and progressive growth of the ideals of Humanity, urged by the power back of legislation and crystalized into statute and constitutional law.

Inquiry leads step by step through the various by-paths of legal science. Indeed, it is doubtful whether an ample perspective of the whole subject can be attained, if at all, except through some one or other specialization, be it a constitutional provision, a statute or a local ordinance. The reason for this will become obvious when we consider that it is through the application of concrete instances only that the force and effect of law can be realized. The philosophy and science of laws are so closely interwoven that to attempt to draw other

than a general distinction between them seems to be an impossibility. Whenever we posit the existence of the science of laws, we thereby recognize the philosophical cause back of the particular expressions. Taking as an illustration the law of contracts, and further specializing until it becomes the law of building contracts, we find that the basis for the practical application of this part of the law of contracts is fixed, as is the case with all other just laws. It is a standard built up by the requirements, the necessities and desires of aggregations of people, who have, through a considerable period of time, experienced the necessity of building houses, employing builders and paying for the structures built, in money or some other medium of exchange. As will be readily seen, the science or precise knowledge of the application of this law of contracts forms an integral part of its philosophy, and is necessary to insure the making and interpreting of the contract in accordance with the special needs and customs surrounding the particular transaction. Any branch or department of law will afford illustration of this principle. On the other hand a broad distinction may be recognized between the philosophy and science of laws. We may, to a certain extent, perceive the details of special laws as included in and helping to form the general law of Progress. In other words, we know from the existence of the special laws that the reason, truth and philosophy of them must also exist as their substance and power. Any advance, therefore, must in a measure contemplate law as a science.

The moral tendencies back of Society are adamantine supports for the structures of statutes, rules, regulations and ordinances, and afford the bases for varying applications of and in the science of laws. The point is this—that not only does it appear that the laws are, philosophically considered, based on justice and true spontaneity, but that, as a necessary environment thereto, the intent of their administrators and the machinery of their administration, as well as the rights of those to whom the laws specifically apply, are equally harmonious and rest upon the same foundation. Humanity has at heart a sense of justice and an appreciation of equity, and the whole tendency is to express these. Mistakes are often made, it is true, and hardship sometimes results from them, but these facts are no argument against either the philosophy or science of law. On the contrary they show the necessity for a broad study on the part of the legal scientists, the avoiding of all unnecessary friction, and a general appreciation of the situation by those invoking the law.

A due regard by both layman and lawyer for the dignity of our Courts and a broad comprehensive view of both the philosophy and science of law by the Bench form a stable bulwark against which the tide of heterogeneous legislation rolls and is either dashed into the spray of unconstitutionality or built into the structure of the philosophy of law.

HARVEY D. CHENEY.

Los Angeles, Cal.

CONTRACT—BENEFIT OF THIRD PERSON.

LOCKWOOD et al. v. SMITH.

(Supreme Court, Trial Term, Suffolk County. June, 1913.)

143 N. Y. Supp. 480.

Where, by a written agreement, a grantee agreed to support the grantors during their lives and to pay their funeral expenses, no action could be maintained thereon for the funeral expenses by parties claiming under the undertaker, who was not a party to the agreement, whether such agreement was under seal or not.

Jaycox, J. (1) This action is brought to recover the funeral expenses of one Thomas Atkin. During his lifetime said Thomas Atkin and Ann E. Atkin, his wife, entered into a written agreement with the defendant, in consideration of the conveyance of certain real estate, to support the said Ann E. Atkin and Thomas Atkin during the term of their natural lives, and at their decease to pay their respective funeral expenses. The making of the agreement, the conveyance of the proper-

ty to the defendant, the rendition of the services, and their reasonable value are all admitted. The defendant, however, says that he cannot be sued by these plaintiffs under the agreement in question as it is under seal, and relies upon Case v. Case, 203 N. Y. 263, 96 N. E. 440, Ann. Cas. 1913B, 311, as absolute authority for his position.

That case recognizes the fact that there are exceptions to the rule which prevents a person not a party to an instrument under seal from bringing suit thereon, and my examination of the cases leads me to the conclusion that the presence or absence of a seal has had very little bearing upon decisions of the courts. The case in question states:

"The case at bar is not within this or any other exception to the general rule, for the plaintiff is a mere volunteer, who is not a party to the contract, and who is an utter stranger to the consideration."

Under these circumstanecs the plaintiff would not be entitled to recover whether the agreement was under seal or not. Later in the opinion it is said that in Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49, Judge Andrews seems to put the whole doctrine in one pregnant paragraph, and quotes as follows:

"It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance, and so within the contemplation of the parties, and in addition the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance."

If these elements are present the agreement has been enforced at the instance of the third party, regardless of whether the instrument was under seal or not. See Coster v. City of Albany, 43 N. Y. 399, and a long line of cases following it, down to and including Pond v. New Rochelle Water Co., 183 N. Y. 344, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504; also Baird v. Erie R. Co., 148 App. Div. 452-461, 132 N. Y. Supp. 971.

The real distinction between the cases where a third party has been permitted to enforce an agreement and those in which the third party has been denied relief is that in the former class of cases the promisee has been under some legal obligation to the third party, which that party would have a right to enforce against the promisee. That was the situation in Lawrence v. Fox, 20 N. Y. 268, and that has been the situation in all the cases in which that case has been followed. This distinction is made very clear in Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195, where the grantee in a deed assumed the payment of a mortgage which covered the premises described in the deed. The grantor was not personally liable for the payment of this mortgage, and it was held that the mortgagee could not enforce the covenant in this conveyance as the grantor was not under any obligation to the mortgagee.

In the case of Coster v. City of Albany, supra, the state was about to make an improvement which would result in an injury to the plaintiffs. It was therefore under an obligation, or at least owed the duty to these plaintoffs of indemnifying them. This duty the defendant assumed in an agreement between it and the state, and it was held that the plaintiffs could enforce that agreement notwithstanding its being under seal.

In Pond v. New Rochelle Water Co., the village of Pelham Manor owed the plaintiff, who was a resident of such village, a duty, and in the execution of that duty it had entered into a contract with the defendant, and the court held that, notwithstanding the contract being under seal, it could be enforecd at the instance of a resident of said village of Pelham Manor.

If I am right in my view as to the essential elements which will permit the enforcement of a contract by a person not a party to it, it then remains but to ascertain whether or not in this case those elements are present. To state the matter more clearly I will quote from Vrooman v. Turner, supra:

"To give a third party, who may derive a benefit from the performance of the promise, an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and, second, some privity between the two the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally."

(2) In this case it is but necessary to determine, therefore, whether the decedent, Thomas Atkin, owed any obligation to the plaintiffs or their intestate. I am unable to discover any such duty or obligation. While the property of a decedent is liable for his funeral expenses, he is under no obligation to preserve or retain property until his death, that it may be subject to the payment of his funeral expenses; and, if in good faith he disposes of all of his property prior to his death, it never would be held that thereby he had committed

any fraud upon one who, after his death, should see that he was decently and properly buried. I am, therefore, unable to see that at the time of making this agreement the promisee, Thomas Atkin, was under any duty or obligation to the plaintiffs or their intestate which would permit them to maintain this action. I am unable to see that there is any privity between the plaintiffs or their intestate and the promisee, Thomas Atkin, in the agreement above mentioned.

The defendant is therefore entitled to judgment dismissing the complaint.

Judgment for defendant.

NOTE.—*Promise Under Seal for the Benefit of a Third Person.*—The instant case seems to have behind it not only the weight of, but possibly all, the authority so far as concerns the necessity of there being some duty legal or moral owing by the promisee to a third person. We think also it has the weight of authority on its side in its reasoning on the question of the instrument being or not under seal, though it is greatly to be doubted whether it construed properly Case v. Case, 203 N. Y. 263, 96 N. E. 440, Ann. Cas. 1913 B, 311. That case says: "Nothing is more definitely settled in our law than that an instrument under seal cannot be enforced by or against one who is not a party to it. This is so elementary as to be axiomatic and needs no support in the citation of authorities. A different rule exists as to simple contracts upon which for reasons adverted to in Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617, actions may be brought by or against the real principal, although he is not named in the instrument. There are exceptions to the rigid rule that only parties to a contract under seal can be parties to a litigation for its enforcement, such, for intance, as a suit to enforce an ante-nuptial agreement for a marriage settlement by the person for whose benefit it was made, but even in such cases it is the rule, both in law and equity, that mere volunteers or strangers to the consideration have no standing in court." In this case there was a moral duty on the third person to support his mother for whose benefit the contract was made, but the contract being under seal was held not enforcible by her, because there was not "a legal interest (in the promissee) that the covenant be performed in favor of the party claiming the performance." In this case the plaintiff had conveyed property to defendant based upon said contract under seal, as consideration therefor, though he was not a party mentioned in the contract. He was a third person only as parting with a consideration which failed in non-performance.

In Hendrick v. Lindsay, 93 U. S. 143, 149, 23 L. ed. 855, it was urged that as M.'s name, one of the plaintiffs, does not appear in certain letters of defendant, he could not join in the action. The court said: "This would be true, if the promise were under seal, requiring an action of debt or covenant: but the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country."

In Farmington v. Hobert, 74 Me. 416, it was said: "Where the contract is by an agent or servant and not under seal, suits have been sustained in the name of parties for whose use and benefit they were made. It is otherwise when they are under seal." In an earlier case in this state it was said: "Where one promises another for the benefit of a third person, such third person may maintain assumpsit in his own name. Where one covenants with another to do any act for the benefit of a third, the rule differs from that in assumpsit, and the action cannot be maintained upon such covenant in the name of a third person for whose benefit it was made." Hinkley v. Fowler, 15 Me. 285, 289.

In Clark v. Bullard, 208 Mass. 586, 588, 94 N. E. 1042, it is said: "The releases are under seal and in regard to them the law has always been that only those who were parties to them could sue upon them."

In Seigman v. Hoffacker, 57 Md. 321, 325, the same distinction between contracts under seal and simple contracts, above stated, is drawn. In New Hampshire, Chamberlain v. New Hampshire F. Ins. Co., 55 N. H. 249, 261; in Pennsylvania, American Ins. Co. v. Insley, 7 Pa. St. 223, 47 Am. Dec. 509; in Rhode Island, Woonsocket Rubber Co. v. Banigan, 21 R. I. 146, 42 Atl. 512; in Tennessee, McAlister v. Marberry, 4 Humph. 426; in Vermont, Morrill v. Catholic Order of Foresters, 79 Vt. 479, 65 Atl. 526 and in Wyoming, McCorteney v. State Nat. Bk., 1 Wyo. 382, this rule is followed. Greatly, however, because of strictness in pleading does it seem adhered to.

There are many states, however, in which no such effect is attributed to the seal. Thus an agreement was an assumption in a deed and one not a party thereto but for whose benefit the assumption was, held entitled to recover. North Ala. Devel. Co. v. Short, 101 Ala. 333, 13 So. 385. In a Colorado case it is said after citing a number of cases: "In these cases, and many others that might be cited, the old rule that no one but a covenantee could sue on a covenant is distinctly repudiated." Starbird v. Cranston, 24 Colo. 20, 27, 48 Pac. 652.

In Kimball v. Noyes, 17 Wis. 695, the court reviews many cases, concluding by saying, that there is no sound reason for saying that one is sufficiently a party to a contract to sue upon it before it has a seal, but not so afterwards. "If it is an unsealed promise to him before, by the same reasoning it is an unsealed promise to him afterwards. It follows, that as the rule is fully established in this country, that such third party may sue upon a simple contract for his benefit, the law to be consistent shall allow the same on a contract under seal."

In some states statute has put sealed and unsealed contracts on the same footing in the regard of which we are speaking, as, for example, Illinois, New Jersey and Virginia.

In Missouri it was said: "I see no good reason for keeping up this sort of distinction between contracts under seal and not under seal. If the covenant is made for the benefit of a third person, why is he not a party to it so as to maintain an action in his own name?" Rogers v. Gosnell, 51 Mo. 466. See also St. Louis v. Von Phul, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695.

For other cases are cited, Jefferson v. Asche, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep.

618, 25 L. R. A. 257; Blakely v. Adams, 113 Ky. 392, 68 S. W. 393; Emmitt v. Brophy, 42 Ohio St. 82; Knight, etc., Co. v. Castle, 172 Ind. 97, 87 N. E. 976, 27 L. R. A. (N. S.) 573; Kauffman v. Cooper, 46 Neb. 644, 65 N. W. 796, in all which there is to be found support for the instant case. C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS OF THE NEW YORK COUNTY LAWYERS ASSOCIATION'S COMMITTEE ON PROFESSIONAL ETHICS.

In answering question this committee acts by virtue of the following provisions of the by-laws of the Association, Article XVI, Section III:

"This Committee shall be empowered when consulted to advise inquirers respecting questions of proper professional conduct, reporting its action to the Board of Directors from time to time.

It is understood that this committee acts on specific questions submitted ex parte, and in its answers bases its opinion on such facts only as are set forth in the question.

Question No. 36.—An individual engaged in the printing business, and making a specialty of case and brief printing, presents the following question:

"In the opinion of the Committee of Professional Ethics is there impropriety in my advertising in connection with my business the following:

"First Class Briefs Written for the Profession by Able Lawyers. Also Cases on Appeal Prepared."

and in my employing for my customers lawyers to write briefs and to prepare cases on appeal, making arrangements with them for their compensation by me out of the compensation received by me for the combined work of furnishing to my customers cases on appeal and briefs written by my said lawyers and printed for the use of my customers at my printing establishment?"

Answer No. 36.—While this question appears to be propounded by one not a member of the profession, yet since it involves questions of "proper professional conduct," the Committee expresses its opinion as follows:

The course of action suggested would in our opinion be improper for the following reasons:

1. A printer so advertising, even if he were not violating the letter of Section 270 of the Penal Law, which makes it unlawful for a person who has not been duly admitted to the bar to practice law, would certainly be acting contrary to the spirit of that provision.

2. Section 280 of the Penal Law makes it unlawful for a corporation to furnish legal services or advice in this way. We think the principle which underlies this provision applies equally to an individual who is not a lawyer, and makes it equally improper for him to furnish legal services in this manner.

3. The relation between attorney and counsel is of a personal and fiduciary nature, and imposes obligations and responsiblities which cannot be fully realized unless the attorney and counsel deal with each other directly.

4. The relation of the writer of a brief to the court is one the dignity and responsibility of which are inconsistent with the scheme proposed.

5. The offer by a third party, not an attorney, to furnish or sell the legal services of members of the bar (in this case undisclosed), is derogatory to the dignity and self-respect of the profession and would tender to lower the standards of professional character and conduct.

Question No. 37.—Mrs. O, a client of A, an attorney, informs him that she deserted her husband over three years ago. That her husband is living in the City of——, State of——, and has resided there, she believes, for a considerable period. That she is satisfied that she can never live with him again under any circumstances.

She desires A, as her attorney, to see Mr. O, to ask him if he will not institute proceedings for a divorce against her in said State of——, in which State she is informed he is entitled to a divorce on the ground of her desertion, and of which state he has been a resident for a sufficiently long time.

Is A, in accepting the retainer, and having the interview with Mr. O., guilty of unprofessional conduct?

Answer No. 37.—In the opinion of the Committee, it is not unprofessional to accept such a retainer, and there is no collusion or other impropriety in asking a husband to enforce rights which have already accrued. In view of the only too numerous scandals connected with divorce litigation, however, the Committee, believes that attorneys should be particularly careful in all such cases to satisfy themselves that there has been no collusion in the prior conduct of the parties.

Question No. 38.—Is it proper for a young man of twenty-two, who at present is completing a three-year course at law school, and has

worked for about two years in a law office, but has not as yet been admitted to practise, to open an office at his place of residence and there do notarial work, (he being a notary public), draw various legal papers, manage estates, collect rents and do a general real estate and insurance business?

Also state whether such a pursuit would in any way affect the standing of such a person, when applying for admission to the bar, so that it might give the Committee on Character cause for hesitating in their approval of him,

Answer No. 38.—In the opinion of the Committee, he should refrain from the business of drawing legal papers. The giving of legal advice by notaries and others who are not admitted to practice law is, in its opinion, dangerous to the welfare of the community, because such persons have not demonstrated their capacity by submitting to examinations lawfully established for practitioners of law. The Committee is not aware of any reason why he should not engage in the other employments mentioned to such extent as may not interfere with the proper completion of his law course. The Committee cannot assume to express any views for the Committee on Character.

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BOOK REVIEW.

COOK ON CORPORATIONS. SEVENTH EDITION.

In the course of twenty-six years this work has appeared in seven additions, inclusive of the last which lies upon our table, with the lapse of only two years between the first and second edition. New editions have appeared in recurring cycles of five years and, well it may be thought, that no subject in the law prima facie would more justify new editions to supplant their predecessors.

Take for example the last edition in comparison with the sixth, and no one would think what the author says in his preface is at all outside of the mark: "The five years which have now elapsed since the sixth edition of this work was published have certainly been triumphant, after the battle of ideas, translated into law. The subjects particularly of state regulation of railroads, the anti-trust act of Congress, ultra vires acts, frauds, stockholders' suits, reorganizations, powers of corporate officers, organization and legality of unincorporated associations or express trusts, foreign corporations, and the rights, duties and liabilities of quasi-public corporations in general, have led to the addition of some six thousand citations in this edition."

A lawyer need not have been in corporation practice, mainly or greatly, instantly to recognize the truth of all this. Indeed the intelligent layman knows that it must be so, and prophesy sees that the end is not yet.

Cook on Corporations is beyond doubt the most respected authority on the important subject which it treats. Lawyers have found it accurate and clear in both arrangement and statement of the text. Mr. Cook is not eloquent but is always graceful and perpicaceous in his style. There is no difficulty in understanding the author who is never involved and whose argument always displays a master's grasp of the subject in hand.

This edition is in more volumes than its immediate predecessor, and the reputation of its author, Mr. William W. Cook of the New York Bar, a lawyer in active practice, assures the profession that it is kept within the confines of as terse statement, as comprehensiveness in treatment permits, and there are very few other works on corporations that will serve the lawyer so satisfactorily and completely as this one.

These volumes are up to date in typographical execution with their binding of law buckram, the whole embracing over 4,000 pages and they come from the well-known law book house of Little, Brown and Company, Boston. 1913.

HUMOR OF THE LAW.

Griggs—"Your lawyer made some very severe charges against the defendant, didn't he?"

Briggs—"Yes; but you ought to see how he charged me."

The newly elected county attorney ruffled his hair, and proceded to examine the next witness.

"What is your name?" he asked.

"Pat Moran, sor," was the respectful reply.

"How do you spell it"

"Well, well!" laughed Pat. "County attorney, an' can't spell Pat Moran!"

The superior court of the State of California, in and for the county of San Diego last week granted Kate Viola Meals an interlocutory decree divorcing her from Jasper W. Meals on the ground of extreme cruelty.

This item of news seems to have aroused the "punning" proclivities of many members of the bar. One writing to the "Docket" observes that it would take pretty severe "extreme cruelty" before most of us would consent to be divorced from our Meals.

Still another rushes into verse, as witness the following:

"From a glance upon the record it can easily be told
That the Meals the lady sacrificed was anything but cold.
We cannot keep from wond'ring how this hungry lady feels;
If she's glad or if she's sorry that she thus threw up her Meals.
And after Meals what can she do, where shall she go, alas!
The horrid thought suggests itself, the awful demi-tasse."—C. F.

The other evening a man of the burglar type stepped up to an old gentleman, and, handing him a piece of paper, said:

"Sir, would you be good enough to read me the writing on this piece of paper?"

The individal addressed consented, and, moving toward the rays of a convenient gas lamp, read the following words:

"If you utter a cry or speak a single word I shall shoot you. Give me your watch and chain and your purse at once and then pass on"

Completely taken off his guard, the gentleman handed over the articles asked for and walked off. A few steps brought him to a policeman, and, relating his story, the pair proceeded in pursuit of the stranger, who was not yet out of sight.

Next morning before the magistrate, the vagrant was called upon for an explanation.

"Your honor," he said, "I am not an educated man, and therefore can neither read nor write. Last evening I picked up a piece of paper, and, it striking me that it might be of some importance, I took it to the first person I met and asked him to decipher it. The gentleman read it quietly to himself, and then, without saying a word, handed me his watch, chain, and purse, and walked off without giving me time to recover from my surprise or to ask him what he meant."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Alteration of Instruments**—Indorsing False Credit.—The payment of part of the principal of a note and the indorsement thereof upon the back of it, not made in good faith, but before delivery to reduce the amount of the note, is an alteration of the note.—Washington Finance Corporation v. Glass, Wash., 134 Pac. 480.

2. **Attachment**—Action on Bond.—Where an attachment has been wrongfully issued, the defendant may sue upon the bond for actual damages sustained.—Jaksich v. Guisti, Nev., 134 Pac. 452.

3. **Bankruptcy**—Conditional Sale.—Where a conditional contract of sale of a soda fountain to the bankrupt was invalid because not recorded, a chattel mortgage of the soda fountain executed three days before the mortgagor's bankruptcy and when the mortgagee's representatives had reasonable grounds for believing that a preference was intended and would result was void as against the bankrupt's trustee.—L. A. Becker Co. v. Gill, C. C. A., 206 Fed. 36.

4.——Injunction.—A proceeding in a state court to wind up an insolvent corporation in which a receiver is appointed tends to defeat the operation of the bankruptcy law, and may be stayed by injunction.—Morehouse v. Giant Powder Co., C. C. A., 206 Fed. 24.

5.——Jurisdiction.—In a proceeding by a trustee for an order authorizing the sale of real estate in his possession, the bankruptcy court is without jurisdiction to cite into court a mortgagee of such real estate and adjudicate upon the validity of his mortgage, without his consent and over his objection.—In re Henderson, U. S. D. C., 206 Fed. 139.

6.——Pledge.—A contract by which a bankrupt agreed that in the event that certain goods, which he had sold, and the accounts for which had been assigned to a bank, were returned, it would hold the goods or the proceeds in trust for the bank and deliver the same on demand in the absence of such delivery, held not a valid pledge.—In re Shulman, U. S. D. C., 306 Fed. 129.

7.——Referee.—Orders and proceedings of a referee in bankruptcy are presumed to be correct unless clearly proved to be erroneous.—In re Malschick & Levin, U. S. D. C., 206 Fed. 71.

8. **Banks and Banking**—Collection.—A bank holding a draft for collection is not authorized to accept anything but money in payment thereof.—Bradley Lumber Co. v. Bradley County Bank, C. C. A., 206 Fed. 41.

9.——Estoppel.—Where a bank having wrongfully sold certain pledged collaterals to its president later claimed that his holding thereof inured to the benefit of the bank, it was chargeable with his assertions of ownership inconsistent with the rights of the pledgor.—King v. Boerne State Bank, Tex., 159 S. W. 433.

10.——Ratification.—Where a person, as soon as he learned of an unauthorized deposit of his funds in a bank, drew drafts thereon, he did not ratify the deposit, in the absence of proof of his assent therto.—Daughtry v. International Bank of Commerce, N. M., 134 Pac. 220.

11. **Bills and Notes**—Accommodation Maker.—The maker of an accommodation note is not liable thereon, when in the hands of the one for whose accommodation it was made.—Neponset Nat. Bank v. Dunbar, 143 N. Y. Supp. 174.

12.——Burden of Proof.—Where a note is payable to order, a transferee without indorsement must aver and prove the consideration.—Witt v. Campbell-Lakin Segar Co., Ore., 134 Pac. 316.

13.——Consideration.—The statutory presumption of consideration for a note is of itself evidence of consideration, which may be sufficient to establish the fact where the testimony to the contrary is not satisfactory.—Estes v. Ballard, Cal., 134 Pac. 361.

14. **Boundaries**—Discrepancy.—Where, in a description of property, there is a discrepancy between courses and distances and monuments mentioned, the monuments must control.—Johns v. City of Pendleton, Ore., 134 Pac. 312.

15.——Field Notes.—Field notes of subsequent surveys by a surveyor, not shown to have had any knowledge of the location of the original lines or corners, are inadmissible to show by their calls for the original surveys the location of the lines and corners thereof.—State v. Dayton Lumber Co., Tex., 159 S. W. 391.

16.——Parol Agreement.—The owners of contiguous tracts may settle a disputed boundary by parol agreement, which, when acquiesced in, is binding on the parties.—Rodriguez v. La Cueva Ranch Co., N. M., 134 Pac. 228.

17. **Brokers**—Commissions.—Where defendant made no agreement to pay broker's commissions unless an actual exchange of the property in controversy was effected, no exchange having been accomplished, plaintiffs could not recover on quantum meruit for services performed and money expended in an effort to effectuate a sale.—Cheatham & Haney v. Danby, Tex., 159 S. W. 385.

18.——Employer's Fault.—A broker is entitled to his commission when he procures a pur-

chaser able and willing to buy, even though no enforceable contract is entered into, if the sale fails through the fault of the owner.—Schweid v. Storandt, 143 N. Y. Supp. 161.

19. **Carriers of Goods**—Rates.—A carrier may recover the difference between the rate charged on an interstate shipment and the higher published rate, filed with and approved by the Interstate Commerce Commission, though the schedules have not been posted.—Northern Alabama Ry. Co. v. Wilson Mercantile Co., Ala., 63 So. 34.

20. **Carriers of Live Stock**—Initial Carrier.—Notice to the agent of an initial carrier contracting to transport an interstate shipment of cattle of an arrangement whereby the consignee was to pay the freight held notice to connecting carriers along the route.—Missouri Pac. Ry. Co. v. Cheek, Tex., 159 S. W. 427.

21. **Charities**—Pious Uses.—"Legacies to pious uses" are those destined to some work of piety or object of charity, and have their motives independent of the consideration which the merit of the legatee might procure to them.—Succession of Tilton, La., 63 So. 99.

22. **Chattel Mortgages**—Future Crops.—In order for a mortgage to create a lien on crops to be grown in the future, the mortgagor must, at the time of the execution of the mortgage, have owned or had some interest in the lands on which the crops are to be grown.—Phillips-Neely Mercantile Co. v. Banks, Ala., 63 So. 31.

23.——Purchase Money.—A purchase-money mortgage of chattels creates a lien superior to a prior general mortgage executed by the purchaser on the same property.—Smith & Ricker v. Hill Bros., N. M., 134 Pac. 243.

24. **Conspiracy**—Overt Act.—To sustain a conviction of criminal conspiracy, it is necessary to allege and prove not only the making of the conspiracy, but the commission of some act to effect the object thereof.—People v. Johnson, Cal., 134 Pac. 339.

25.——Overt Acts.—When one enters a conspiracy to do an unlawful act, he becomes a party to every act which has been previously done by his co-conspirators in furtherance of a common design.—Eaton v. State, Ala., 63 So. 41.

26. **Contracts**—Inquiry.—Notice of facts and circumstances which would put a man of ordinary prudence and intelligence on inquiry is equivalent to knowledge of all the facts that a reasonably diligent inquiry would disclose, within the requirement, that one having a right to rescind must do so promptly on discovering the facts entitling him to do so.—Garstang v. Skinner, Cal., 134 Pac. 329.

27.——Time of Essence.—The provision that time is of the essence of a contract may be implied from the character of the subject-matter, where it is likely to undergo sudden, frequent or great fluctuations in value.—Bennie v. Becker-Franz Co., Ariz., 134 Pac. 280.

28. **Contempt**—Practice.—There is no prescribed form which must be followed in an information on which a citation for civil contempt is issuel, and in the absence of objection in limine, the papers are sufficient if they clearly apprise the defendant of the nature of the charge.—Morehouse v. Giant Powder Co., C. C A., 206 Fed. 24.

29. **Corporations**—Dissolution.—On the forfeiture of the charter of a corporation for failure to pay its license tax, the directors ipso facto become trustees for the purpose of winding up its affairs.—Turney v. Morrissey, Cal., 134 Pac. 335.

30.——Individual Liability.—The participating officers of a corporation are liable as well as the corporation for damages resulting from the corporation's diversion of funds held by it in a fiduciary capacity.—Bluefields S. S. Co. v. Lala Ferreras Cangelosi S. S. Co., La., 63 So. 96.

31.——Insolvency.—A decree of dissolution of a corporation determines its outstanding contracts operating between the company and its creditors.—United States v. Poe, Md., 87 Atl. 933.

32.——Ultra Vires.—A corporation holding the legal title to land for the benefit of the real parties in interest, promising one of such parties who conveyed his interest to it to aid in litigation that it would reconvey, and which received the full benefit of the performance of such contract, could not defeat the right of such party to a reconveyance on the ground that the contract was ultra vires.—Phoenix Land Co. v. Exall, Tex., 159 S. W. 474.

33. **Courts**—Jurisdiction.—The jurisdiction of a federal court cannot rest on presumption, but, on the contrary, the presumption is against jurisdiction, and it must appear by positive and direct averment.—California-Atlantic S. S. Co. v. Central Door & Lumber Co., C. C. A., 206 Fed. 5.

34. **Criminal Law**—Demonstrative Evidence.—The skull of deceased was properly admitted, where it tended to show the character of one of the mortal wounds alleged to have been inflicted by defendant.—Territory v. Lobato, N. M., 134 Pac. 222.

35.——Motive.—In a criminal prosecution, the state is not required to prove a motive for a crime, if without this the evidence shows that the act was done by accused.—State v. Alva, N. M., 134 Pac. 209.

36.——Practice.—Where the issue was as to the defendant's guilty knowledge of the duplication of a distillery warehouse receipt, he being president of the distillery company, the refusal to admit as evidence for defendant a check book of the company containing checks, signed in blank by defendant, and evidence as to the number of blank warehouse receipts he had similarly signed and left at the office, if error, was not reversible, as the facts which such evidence tended to show were established, without objection by other evidence.—Gambrill v. State, Md., 87 Atl. 900.

37.——Res Gestae.—In a prosecution for homicide by withholding food, statements by deceased as to the food she was receiving are part of the res gestae, since the offense was a continuing one.—State v. Hazzard, Wash., 134 Pac. 514.

38.——Testimony Former Trial.—Inability to find a witness in order to produce him at a criminal trial is a sufficient foundation for the admission of his testimony at a former trial.—Pope v. State, Ala., 63 So. 71.

39. **Damages**—Compulsory Examination.—In the absence of a statutory or constitutional

provision so authorizing, the courts cannot order a plaintiff in a damage case to submit to an examination by a physician.—Atchison, T. & S. F. Ry. Co. v. Melson, Okla., 134 Pac. 388.

40. **Dedication**—Acceptance.—Where streets are dedicated to public use by a platting and sale of lots in conformity with the plat, the municipality may accept or reject an easement tendered or, having accepted, may renounce it by a vacating ordinance, but no act of the public authorities can divest the right of the purchasers to have the street remain open for the use of lot owners.—Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co., Pa., 87 Atl. 968.

41. **Depositions**—Letters Rogatory.—A federal court has power to issue letters rogatory to obtain the testimony of witnesses in foreign jurisdictions, where a commission is likely to prove inadequate.—De Villeneuve v. Morning Journal Ass'n, U. S. D. C., 206 Fed. 70.

42. **Easements**—Prescription.—A right of way claimed by prescription was not established without showing that the use was adverse, and under claim of right communicated to the owner, or was continuously, openly, and notoriously adverse as to create the presumption of knowledge.—Tarpey v. Keith, Cal., 134 Pac. 367.

43. **Ejectment**—Permanent Improvement.—In an action for the recovery of real property, the value of permanent improvements, made by a person holding in good faith and under color of title, adversely to the plaintiff, may be allowed only as set-off to such damages as may be claimed for the withholding of the property sued for.—Kinard v. Kaelin, Cal., 134 Pac. 370.

44. **Eminent Domain**—Damages.—A statute providing for the assessment of the value of land taken in condemnation proceedings will be held to include damages to the remainder as well.—Ridgely v. City of Baltimore, Md., 87 Atl. 909.

45.——Public Use.—"Public use," within the rule authorizing the state to appropriate property for public use under its right of eminent domain, means public usefulness, utility, or advantage, or what is productive of general benefit.—In re Board of Water Com'rs of City of Hartford, Conn., 87 Atl. 870.

46. **Estoppel**—Definition.—"Equitable estoppel" is the effect of the voluntary conduct of a party, whereby he is precluded from asserting rights as against another person who has in good faith relied upon such conduct and been led thereby to change his position for the worse and who has acquired some corresponding right.—Chambers v. Bessent, N. M., 134 Pac. 237.

47.——Privity.—"Privity" is most generally defined as a mutual or successive relationship to the same right of property; but in the doctrine of estoppel it has a much narrower meaning, and means participation in the act of misrepresentation or fraud out of which the estopel arises.—Smith & Ricker v. Hill Bros., N. M., 134 Pac. 243.

48. **Evidence**—Judicial Notice.—The Supreme Court can take judicial notice of the fact that it might frequently be impossible to hold a referendum election within 30 days after an ordinance has been adopted by the council.—Stetson v. City of Seattle, Wash., 134 Pac. 494.

49.——Res Gestae.—Field notes of surveys made at the same time by the same surveyor are admissible as res gestae.—State v. Dayton Lumber Co., Tex., 159 S. W. 391.

50. **Executors and Administrators**—Mortgage.—In order to foreclose a mortgage on real estate of a decedent, it is not necessary that the debt secured be presented in administration proceedings, but any balance due after foreclosure must be so presented.—Fawcett v. McGahan-McKee Lumber Co., Okla., 134 Pac. 388.

51. **Explosives** — Continuing Nuisance.—A corporation whose servants are blasting under circumstances amounting to a nuisance, is liable for fright, sense of personal danger, and other mental suffering on the part of one whose premises are invaded by stones thrown by the blasts, and not merely for nominal damages as in the case of an isolated trespass.—Birmingham Realty Co. v. Thomason, Ala., 63 So. 65.

52. **Frauds**—Measure of Damages.—The measure of damages for fraud, in inducing an exchange of mortgages for bonds, in the absence of any claim for special damages, is the excess of the value of the mortgages over that of the bonds at the time of the exchange, at least where no circumstances render the values at some other time material to the injury—Garstang v. Skinner, Cal., 134 Pac. 329.

53. **Frauds, Statute of**—Oral Agreement.—Where the consideration for a note was an executory oral agreement to convey land, the maker of the note cannot rely upon the statute of frauds to show failure of consideration, if the land was actually conveyed under the oral agreement before suit was commenced on the note.—Estes v. Ballard, Cal., 134 Pac. 361.

54.——Performance.—A verbal contract, voidable on account of the statute of frauds, when fully performed, becomes by the doctrine of relation a binding contract from its inception.—Phillips-Neely Mercantile Co. v. Banks, Ala., 63 So. 31.

55.——Sale of Land.—An agreement between two or more persons for the joint acquisition of land is not within the statute of frauds, as a "contract for the sale of land."—Phoenix Land Co. v. Exall, Tex., 159 S. W. 474.

56. **Homestead**—Abandonment.—Temporary absence from a homestead does not constitute an abandonment thereof, where there is at the time a definite intent to return.—Carter v. Pickett, Okla., 134 Pac. 440.

57. **Homicide**—Aiding and Abetting.—A defendant present at a killing, in pursuance of a common enterprise or adventure having in contemplation the commission of the offense charged to render assistance if necessary, or support or encourage by his acts, words, or presence the acts of perpetrator, is an aider or abettor.—Eaton v. State, Ala., 63 So. 41.

58.——Indictment.—An indictment for murder in the first degree, charging that defendant struck deceased, giving him a mortal wound, of which deceased continually languished until he died, held to charge that deceased died of the mortal wound inflicted by defendant.—Territory v. Lobato, N. M., 134 Pac. 222.

59. **Husband and Wife**—Community Property.—A surviving husband can convey community property to pay community debts, even without administration, if he is sane and the transaction is free from fraud.—Pyle v. Pyle, Tex., 159 S. W. 488.

60. **Injunction**—Bond.—Independent of statute a court of equity may impose such terms by an injunction bond as it deems proper in its discretion.—American Bonding Co. of Baltimore v. State, Md., 87 Atl. 922.

61.——Void Ordinance.—An injunction will not be granted restraining a city from enforcing a liquor ordinance against a hotel keeper, on the ground that the ordinance is invalid; appellant having an adequate remedy at law by pleading the invalidity of the ordinance in defense of a prosecution thereunder.—Holmes v. Salt Lake City, Utah, 134 Pac. 571.

62. **Insane Persons**—Fraud.—A grantee who fraudulently secured a conveyance from an insane person and a judgment confirming the deed, and thereafter conveyed the property to an innocent purchaser, is liable to the guardian of the insane person for damages.—Pyle v. Pyle, Tex., 159 S. W. 488.

63. **Judgment**—Attachment.—An attachment against a non-resident debtor is a legal proceeding in rem, and the court acquires no jurisdiction to render judgment against the debtor, where there has been no valid levy of the attachment.—Remington Typewriter Co. v. Hall, Ala., 63 So. 74.

64.——Conformity to Verdict.—While a judgment must conform to the verdict, it need not literally follow the verdict, but must be rendered in accordance with the disposition of the issues made.—Browne v. Fechner, Tex., 159 S. W. 461.

65.——Constructive Notice.—Constructive notice by publication is sufficient to support a judgment in rem as against non-resident, unknown persons, or persons who cannot be found.—Ridgely v. City of Baltimore, Md., 87 Atl. 909.

66.——Res Judicata.—Where, in an action to recover the proceeds of a gift causa mortis, the state Supreme Court affirmed an order granting defendant a new trial, after which plaintiff dismissed and instituted a new suit in the federal court for the same relief, there was no judgment that could be pleaded as res judicata, but the entire controversy was triable anew.—Harrison v. Foley, C. C. A., 206 Fed. 57.

67. **Landlord and Tenant**—Repairs.—A lessor who, in the absence of stipulation to repair at the request of the lessee, gratuitously authorizes repairs, but does so in such a negligent manner that damages result, is liable therefor to the tenant.—Horton v. Early, Okla., 134 Pac. 436.

68. **Malicious Prosecution**—Burden of Proof.—In an action for malicious prosecution of an attachment, proof of malice and want of probable cause is essential.—Jaksich v. Guisti, Nev., 134 Pac. 452.

69. **Master and Servant**—Assumption of Risk.—A workman when ordered from one part of the work to another and there injured cannot be defeated in an action for damages because he did not discover the danger, a workman not being allowed to stop and examine machinery for himself.—Michalsky v. Centennial Brewing Co., Mont., 134 Pac. 307.

70.——Compensation.—Where an employe was, by his contract of employment, to receive as compensation a percentage of profits of the business, an action of assumpsit at law will lie to enforce payment.—Goodin v. Pitt, Nev., 134 Pac. 459.

71.——Explosives.—In using a dangerous agency, such as dynamite, a master is bound in the exercise of reasonable care to use greater watchfulness and caution in proportion to the danger.—Fred A. Jones Co. v. Drake, Tex., 159 S. W. 441.

72.——Incompetent Servant.—A master is affected with notice of incompetency of a servant, by it put in charge of a donkey engine, both by its knowledge of his inexperience and by complaint, made a few days before an accident through his handling, of the engine, to the master's foreman, of his reckless handling of it.—Ostroski v. Blumauer Logging Co., Wash., 134 Pac. 521.

73.——Ratification.—A master is liable for trespasses by his servants which are the natural and probable results of his orders, or which he ratifies.—Ex parte Birmingham Realty Co., Ala., 63 So. 67.

74.——Vice Principal.—Information given by employes to a vice principal relative to defects in a machine is sufficient to charge the master with notice of same, though the vice principal ignores such information.—Eldridge v. Fell Mfg. Co., Pa., 87 Atl. 966.

75.——Warning.—It is the primary obligation of an employer to instruct a minor employe as to the dangers of the employment; but, if the minor had when employed or subsequently acquires knowledge and appreciation of the danger, the employer is relieved of liability for his failure to instruct.—Reliable Steam Laundry v. Schuster, Tex., 159 S. W. 447.

76. **Mortgage**—Release.—Where a mortgagor without any knowledge of the fraud of the mortgagee's attorney in fact obtained from him a release of the mortgage which had six years to run paying one-half of the mortgage debt, the release is valid and binding, being supported by an adequate consideration.—Rohwer v. Burell, Utah, 134 Pac. 573.

77. **Municipal Corporations** — Governmental Duty.—The doctrine of governmental immunity for municipal acts does not relieve a city from its obligation to perform its governmental duties, but merely relieves it from liability from a resulting injury.—In re Board of Water Com'rs of City of Hartford, Conn., 87 Atl. 870.

78. **Names**—Iden Sonans.—Names are idem sonans, if the ear finds difficulty in distinguishing them when pronounced, or common usage has made them identical in pronunciation.—State v. Alva, N. M., 134 Pac. 209.

79. **Negligence**—Invitee.—One who is upon premises as an employe of a subcontractor under defendant, the principal contractor, is an invitee rather than a licensee, and is entitled to the observance of ordinary care toward him upon the part of defendant.—Lucas v. Walker, Cal., 134 Pac. 374.

80. **Partnership**—Insolvency.—Where a partnership and its individual members are all insolvent, the firm creditors may share in the distribution of the assets of its individual partners equally with the individual creditors for the amount of their claims remaining after the assets of the firm have been distributed.—Robinson v. Security Co., Conn., 87 Atl. 879.

81. **Physicians and Surgeons**—License.—One who attempts to heal diseases by mental suggestion, using medicines and other treatment only as aids to suggestion, and not attempting to treat cases requiring surgical assistance, is required to obtain a certificate of qualification from the State Board of Medical Examiners.—Smith v. State, Ala., 63 So. 28.

82.——Skill and Care.—A surgeon in the treatment of a fractured leg must use the skill and care that surgeons in all similar localities use, not merely in the locality where the surgeon was practicing.—Cranford v. O'Shea, Wash., 134 Pac. 486.

83. **Pleading**—Duplicity.—In an action for tortiously causing a breach of contracts which the plaintiff had for the sale of goods to another, a declaration, which alleged in one count that the plaintiff had a written contract and a separate oral contract with the buyer, is not duplicitous.—Cumberland Glass Mfg. Co. v. De Witt, Md., 87 Atl. 927.

84. **Pledge**—Fraudulent Conveyance. — The rights of a pledgee of corporate stock, who took it without notice that the pledgor held it under a fraudulent conveyance, are superior to those of a creditor of the fraudulent grantor.—Cushing v. Building Ass'n of Society of New or Practical Psychology, Cal., 134 Pac. 324.

85. **Principal and Surety**—Release.—Any material alteration in a building contract will ipso facto release nonconsenting sureties upon the contractor's bond, regardless of any question of the damage done by the alteration.—Lyons v. Kitchell, N. M., 134 Pac. 213.

86.——Substantial Compliance.—A surety on a building contract is liable notwithstanding a slight discrepancy between the name of the owner as signed to the contract and as appearing on the bond, where the statutory requirement that the "owner" shall take the bond is substantially complied with.—Equitable Real Estate Co. v. National Surety Co., La., 63 So. 104.

87.——Surety Company.—The rule of strict construction in favor of sureties has been repudiated in so far as the liability of paid sureties is concerned.—Northern Pac. Ry. Co. v. Fidelity & Deposit Co. of Maryland, Wash., 134 Pac. 498.

88. **Railroads**—Presumption of Care.—In an action for the death of plaintiff's intestate at a street crossing, plaintiff cannot recover, when there is no evidence that deceased looked and listened, or exercised any care, before going upon the tracks.—Young v. Erie R. Co., 143 N. Y. Supp. 176.

89.——Warning.—Where a railroad switching crew knew that employes of a mining company were likely to be working about an ore bin on the siding where they were switching cars at the time they were switching, it was their duty to give warning upon approaching the ore bin for switching purposes, and they were negligent in not doing so.—Colorado Midland Ry. Co. v. Edwards, Colo., 134 Pac. 248.

90. **Receivers**—Practice.—A judgment recovered against a receiver of an insolvent corporation cannot be enforced by seizure of the corporation's assets under an execution.—Houston Ice & Brewing Co. v. Clint, Tex., 159 S. W. 409.

91. **Reference**—Approval.—Where a referee reported the amount due from defendant to plaintiff, but did not report on a question of law as to whether this amount was due at the institution of the action, and the court confirmed this report, the act of the court in rendering judgment for the amount found was in effect an adjudication of the question of law.—Goodin v. Pitt, Nev., 134 Pac. 459.

92. **Sales**—Assignment of Account.—Where, after certain goods had been sold and shipped to the buyer the seller assigned the account therefor and the goods to a bank as security for advances, the assignment of the goods was ineffectual to pass title to the bank on the buyer's refusal to accept them.—In re Shulman, U. S. D. C. 206 Fed. 129.

93.——Breach of Warranty.—Where defendant refused to accept a boiler from a heating company because not in compliance with the contract, his remedy was not limited to an action for damages for breach of warranty.—McElraevy & Hauck Co. v. St. Joseph's Home for Girls, 143 N. Y. Supp. 235.

94.——Breach of Warranty.—A buyer may maintain an action for a breach of the seller's warranty of the quality of goods, though they were accepted and paid for without any complaint being made as to quality.—Ryerson Grain Co. v. Moyer, Ala., 63 So. 13.

95. **Tenancy in Common**—Accounting.—A tenant in common who uses lands need not account to his cotenant until there has been a formal demand by the latter to be admitted to the possession in common, and such demand has been denied; but, where a tenant in common has nothing to do but to receive the rents, he is liable to account to his cotenants for their proportion of the rents so received.—Phoenix Land Co. v. Exall, Tex., 159 S. W. 474.

96. **Trusts**—Resulting Trust.—Where a person made a bank deposit in the names of himself "or" a beneficiary, and instructed the bank to pay the residue at his death to the beneficiary, a trust was created in the residue in favor of the beneficiary at the death of the depositor, though the depositor did not divest himself of the right to check upon the deposit, and from time to time made additional deposits.—Culver v. Lompoc Valley Savings Bank, Cal., 134 Pac. 355.

97.——Resulting Trust.—Resulting trusts arise where the legal estate in property is disposed of or transferred; but the intent appears or is inferred from the terms of the disposition, or from the facts, that the beneficial interest is not to go with the legal title.—Flesner v. Cooper, Okla., 134 Pac. 379.

98. **Usury**—Payment.—Each payment made upon a contract affected with usury is a payment upon the principal applied by law, notwithstanding it was paid and received as payment of interest.—Cotton v. Thompson, Tex., 159 S. W. 455.

99. **Vendor and Purchaser**—Consideration.—Where a partner in a law firm, who had acquired an interest in land, recovered for his clients upon a contingent fee, conveyed it to a company holding the legal title for such clients in order to perfect its title, and to aid in the defense of a suit, a contract by the company to reconvey was supported by a sufficient consideration.—Phoenix Land Co. v. Exall, Tex., 159 S. W. 474.

100.——Option.—Where a contract for the sale of real estate provides that the purchaser will buy the undivided half interest of three minor heirs, and that if he shall not do so on certain terms then the agreement shall be of no effect, and the first party shall be under no obligation to convey her interest, it is a mere option, and is void on failure to comply therewith.—Martin v. Wilson, Idaho, 134 Pac. 532.

101.——Record Title.—The public records being destroyed, the purchaser may, within the time allowed by the contract of sale for examining title, reject the title and recover the deposit money.—Born v. Castle, Cal., 134 Pac. 347.

102. **Wills**—Attestation.—Where witnesses to a will are in the presence of testator, and where he can see them and what they are doing if he chooses, the will is sufficiently attested.—In re Burnham's Will, Colo., 134 Pac. 254.

103.——Personalty.—Wills of personalty are to be construed according to the law of testator's domicile at the time of his death, unless it appears on the face of the will that it should be construed with reference to some other law.—Harding v. Schapiro, Md., 87 Atl. 951.

104.——Specific Legacy.—A testamentary gift to a trustee in trust, to pay from the income a specified sum monthly to the wife of testator for life, to pay specified sums to designated beneficiaries, and to pay on the termination of the trust on the death of the wife, the residue to institutions and corporations named, provides for specific gifts of the specified sums which vest on the death of testator.—Bridgeport Trust Co. v. Marsh, Conn., 87 Atl. 865.

105.——Undue Influence.—Undue influence to vitiate a will must be such that the testament is in fact the will of the person exercising the influence, and not of the testator.—Anderson v. Anderson, Utah, 134 Pac. 553.